Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
BellSouth Telecommunications, Inc.	)	
Emergency Petition for Declaratory Rule	)	
And Preemption of State Action	)	WC Docket No. 04-245
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COMMENTS OF MPOWER COMMUNICATIONS CORP.

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In response to the Public Notice issued by the Federal Communications Commission ("Commission") on July 6, 2004,[1] Mpower Communications Corp. ("Mpower"), through its counsel, hereby submits its Comments in opposition to BellSouth's unlawful and unwarranted "emergency" petition for declaratory ruling and preemption request ("Petition").

I. INTRODUCTION AND SUMMARY.

In its procedurally and substantively deficient Petition, BellSouth asks the Commission to: (1) declare that state commissions have no power to enforce the provisions of Section 271; and (2) "preempt any state commission determination that attempts to regulate the rates, terms, or conditions of any element provided pursuant to Section 271."[2] BellSouth's Petition is both procedurally infirm and substantively deficient, and must be rejected out of hand by the Commission.

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1 *See* Pleading Cycle Established for Comments on BellSouth's Emergency Petition for Declaratory Ruling and Preemption of State Action, Public Notice, DA 04-2028y, (Jul. 6, 2004).

2 Petition at 12.

First, BellSouth's request for a declaratory ruling that state commissions have no jurisdiction over Section 271 network elements is flatly inconsistent with the rulings of this Commission and federal court precedent. As demonstrated below, state commissions clearly have authority over such elements, and BellSouth fails to cite any authority that would suggest otherwise. Second, BellSouth's self-styled generic preemption petition is fundamentally flawed because it fails to comport with the requirements of Section 253 the Telecommunications Act, which sets forth the process that BellSouth must follow in seeking preemption of state action. BellSouth's generic request that the Commission act under Section 1.2 of its General Rules of Practice and Procedure to generally preempt not only the Tennessee Regulatory Authority ("TRA"), but all state commissions in anticipation that they might, at some future date, establish prices for Section 271 elements, is inappropriate and must be rejected.

To the extent that BellSouth wishes the Commission to undertake an examination of whether a state commission ruling should be preempted, the Commission must exercise its authority under Section 253(d) of the Act. However, BellSouth fails to even acknowledge the existence of Section 253, much less make the case that the Commission should anticipatorily preempt the TRA and all state commissions to address the rates, terms or conditions of Section 271 elements. Even if it were not procedurally infirm, the effect of countenancing BellSouth's request would be to prevent, as a practical matter, any regulatory oversight of interconnection agreements, and thereby avoid regulatory oversight of Section 271 unbundling. The Petition should be rejected.

II. GRANTING THE RELIEF SOUGHT BY BELLSOUTH'S "EMERGENCY" PETITION WOULD BE FLATLY INCONSISTENT WITH THE ACT

In its Petition BellSouth requests that the Commission take regulatory action that is both unwarranted and plainly inconsistent with the regulatory scheme set forth in Communications Act of 1934, as amended by the Telecommunications Act of 1996, and the decisions of this Commission and the federal courts. The relief sought by BellSouth in it so-called "emergency" petition is obviously beyond the Commission's existing rules (and statutory authority), and nowhere in its Petition does BellSouth articulate either the authority or the justification to preempt state commission action regarding the establishment of a rate through arbitration for elements under Sections 271 and 251 of the Telecommunications Act of 1996.

A. BellSouth Has Failed to Identify Any "Emergency"

BellSouth provides no factual support whatsoever for the ostensible emergency resulting from the complained of state commission action or potential actions. In BellSouth's view, an emergency exists because BellSouth believes that the decision of the TRA "has the effect of bringing uncertainty to the regulatory scheme at a time in which certainty in the regulatory landscape is critical and terminating any incentive of carriers to enter into commercial agreements."[3] Through this "emergency" petition as well as other similar "emergency" petitions before the Commission,[4] BellSouth asks the Commission to preempt possible state action

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[3] BellSouth Petition, 1-2.

[4] See Public Notice, DA 03-2679 (Dec. 16, 2003). On December 9, 2003, BellSouth filed a request for declaratory ruling that the state commissions may not regulate broadband Internet access services by requiring BellSouth to provide wholesale or retail broadband services to voice service customers of competitive local exchange carriers (CLECs) using unbundled network elements (UNEs). BellSouth requests that the Commission issue an expedited declaratory ruling specifying that: (1) state commission decisions requiring incumbent local exchange carriers (ILECs) to provide broadband Internet access to CLEC UNE voice service customers are contrary to the *Triennial Review Order* and thus must be preempted; (2) state commission decisions requiring the provision of broadband Internet access to CLEC UNE voice service customers impose state regulation on interstate information services in contravention of this Commission's *Computer Inquiry* decisions; and (3) state commission decisions specifying the terms

nationally. The effect of granting this Petition, along with BellSouth's other preemption petitions, would be the creation of a homogenous national regulatory climate that would remove state regulatory authority over Section 252 arbitration proceedings and place it with the Commission.

B. State Commissions Have Jurisdiction Over Section 271 Elements By Incorporation of the Section 252 State Commission Review and Approval Process In Section 271

BellSouth argues that the only authority a state commission has over Section 271 elements is a "consultive" one in the context of the a state's advisory role in the context of an RBOC's Section 271 application.[5] This assertion is plainly false, as the plain language of Section 271 itself makes crystal clear. The only way for Section 271 unbundling to occur is by means of interconnection agreements that have been approved by state commissions under Section 252. State commission authority under Section 252 necessarily includes the price term. BellSouth neither addresses nor refutes this fact, but instead, it simply conveniently ignores it.

Contrary to BellSouth's claim, the mere applicability of the just and reasonable pricing standard for Section 271 unbundling does nothing to divest state commissions of the plenary Section 252 authority that Section 271 vests in them under the clear language of the statute. Though obvious and undeniable, BellSouth fails to acknowledge in its Petition that unbundling under Section 271 is accomplished by means of interconnection agreements *and* that these agreements are subject to review, approval, arbitration, interpretation and enforcement by state public service commissions under Section 252.[6]

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and conditions under which ILECs provide federally tariffed broadband transmission either on its own or as part of a broadband information service intrude on this Commission's exclusive authority over interstate telecommunications and thus are unlawful.

5 Petition at 6-8.

6 *See* 47 U.S.C. §§ 271(c)(1)(a) and 271(c)(2)(A).

The Eleventh Circuit Court of Appeals, sitting *en banc*, recently echoed the unanimous view of the FCC and the other courts that have considered the scope of state authority over Section 271, holding that "the language of § 252 persuades us that in granting to the public service commissions the power to approve or reject interconnection agreements, Congress intended to include the power to interpret and enforce in the first instance."[7] BellSouth's petition is a not so thinly veiled an attack on Section 252 review of interconnection agreements by state commissions, a fact made clear by BellSouth's position in the TRA's *ITC^DeltaCom* arbitration that state commissions have no authority to review the price terms in a Section 252 arbitration.[8]

The gravity and audacity of BellSouth's attack should not be underestimated. Section 252 is essential to enforcement of the 1996 Act because the pro-competition and anti-discrimination policies of the 1996 Act, as well as state law, can be enforced only through state commission review and enforcement of interconnection agreements.[9] Any attempt to defeat state commission authority under Section 252 is a grave threat to telecom regulation, and has been recognized as such by the Commission.[10] The Commission properly viewed Qwest's refusal to file interconnection agreements as an alarming attack on the core mechanism for enforcing the 1996 Act, where it noted: "Requiring filing of all interconnection agreements best promotes Congress' stated goals of opening up local markets to competition, and permitting interconnection on just, reasonable, and nondiscriminatory terms. State commissions should

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7 *BellSouth Telecommunications, Inc. v. MCIMetro Access Transmission Services, Inc.*, 317 F.3d 1270, 1277 (11th Cir. 2003); see also Southwestern Bell Tel. Co. v. PUC, 208 F.3d 475, 479-80 (5th Cir.2000); MCI Corp. v. Illinois Bell Tel. Co., 222 F.3d 323, 344 (7th Cir.2000)

8 *See also In Re: Petition for Arbitration of ITC^DeltaCom Communications, Inc. v. BellSouth Telecommunications, Inc. Pursuant to the Telecommunications Act of 1996 Georgia Public Service Commission*, Docket No. 16583-U, Order dated November 20, 2003, Issue 26(c), at 11.

9 *BellSouth Telecommunications, Inc. v. MCIMetro Access Transmission Services, Inc.*, 317 F.3d at 1278 ("interconnection agreements are the tools through which [the 1996 Act is] enforced").

10 *See, e.g., In Re: Qwest Corp., Apparent Liability for Forfeiture*, File No. EB-03-IH-0263, March 12, 2004 ("*Qwest NAL*") (largest proposed forfeiture in FCC history ($9 million) for Qwest's refusal to file interconnection agreements for state review and approval).

have the opportunity to review *all* agreements ... to ensure that such agreements do not discriminate against third parties, and are not contrary to the public interest."[11]

Later, the Commission reiterated that "Section 252(a)(1) is not just a filing requirement. Compliance with Section 252(a)(1) is the first and strongest protection under the Act against discrimination by the incumbent LEC against its competitors."[12]

BellSouth could effectively prevent the formation of any interconnection agreements by simply refusing to agree on price terms, as BellSouth has in many state arbitration proceedings, and then asserting that state commissions have no authority under Section 252 to resolve the pricing dispute that they have cynically manufactured. If successful in this tactic, BellSouth could exert unchecked monopoly power against its competitors. Thus, even as BellSouth professes its commitment to provide access to 271 elements in proceedings before state commissions, it has set out to effectively abolish the obligation in this proceeding.

C. BellSouth's Jurisdictional Arguments are Inapposite.

BellSouth argues that "Section 252 grants state commissions authority only over implementation of Section 251 obligations, not Section 271 obligations."[13] In support of this assertion BellSouth relies upon *MCI v. BellSouth*. Contrary to BellSouth's assertion, however, the case it cites does not address a state commission's Section 252 authority over interconnection agreements for Section 271 unbundling. Rather, BellSouth's authority merely states that a state commission's role in the Section 271 *application process* is limited to that provided by Section 271(d)(2)(B), namely that the FCC shall "consult with the State commission ... in order to verify the compliance of the Bell operating company with the requirements of subsection (c) of this

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11 *Qwest NAL*, ¶ 21, *citing Local Competition Order*, 11 FCC Rcd at 15583-84, ¶ 167 (emphasis in original).

12 *Qwest NAL*, ¶ 46.

13 Petition at 8.

section." BellSouth's attempt to twist the holding of this case should not find an audience at the Commission.

What BellSouth fails to comprehend is that there is a fundamental distinction for jurisdictional purposes between the plenary Section 252 authority of a state commission over interconnection agreements and its much more limited Section 271(d)(2)(B) consultative authority when a Bell operating company is applying to the FCC to enter the interLATA market. Simply put, the case cited by BellSouth, one of the only cases, in fact in its Petition, is inapposite.

BellSouth also argues that the enforcement mechanism of Section 271(d)(6) supports the view that state commissions have no role in Section 271 enforcement proceedings.[14] This is a fundamental misreading of the statute. Section 271(d)(2) clearly provides that "Before making *any* determination *under this subsection*, the Commission shall consult with the State Commission of any state that is the subject of the application in order to verify the compliance of the Bell operating company with the requirements of subsection (c)."[15] "Under this subsection" means any determination under subsection (d) in its entirety, including those under (d)(6).[16]

Thus, even in enforcement proceedings under Section 271(d)(6), the Commission is required to consult with the state commission. But the larger error in BellSouth's argument is their claim that the price term of interconnection agreements for Section 271 unbundling is not subject to plenary state commission jurisdiction under Section 252. It clearly is, under the

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14 *See* Petition at 10.

15 Emphasis added.

16 This is plain from the internal hierarchy of section, subsection, paragraph and subparagraph as used in the statute's internal references. A "Section" refers, for example to a code Section as a whole, like § 271. A "subsection" refers to the highest level beneath the level of Section, such as subsection (a) or (d) of Section 271. A "paragraph" is the next lowest level, as in paragraph (1) of subsection (d). A subparagraph is the next lowest, as in subparagraph (A) of paragraph (1) of subsection (d) of Section 271.

express and unambiguous terms of the statute. In the end, BellSouth's argument that Section 271 pricing issues are within the exclusive jurisdiction of the FCC is refuted by Section 271's clear incorporation of state commission authority under Section 252 to review, approve, arbitrate interpret and enforce interconnection agreements.

D. A Finding of Non-Impairment Under Section 251 And Application of the "Just and Reasonable" Pricing Standard For Section 271 Elements Does Not Divest State Commissions of Jurisdiction.

BellSouth argues that because a particular element is no longer subject to Section 251 unbundling obligations and Section 251 TELRIC pricing standards, state commissions are somehow divested of their plenary jurisdiction over the elements. BellSouth is mistaken. A finding of non-impairment, and a change in the pricing standard does not alter the price dispute resolution process, or the state-federal division of responsibility for pricing in the 1996 Act or otherwise divest state commissions of their Section 252 authority.

The basic structure of cooperative federalism countenanced by the Supreme Court in *AT&T v. Iowa Utilities Board*, 525 U.S. 366, 384 (1999), under which the FCC defines, through rulemaking, a general methodology that is actually implemented by the state commissions, is equally applicable here. State commissions have authority to review, approve, arbitrate, interpret and enforce the price term for both Section 251 and Section 271 unbundling, and are perfectly capable of applying different pricing methodologies.

In support of its argument that the Commission has exclusive jurisdiction over pricing of Section 271 unbundling, BellSouth cites the "primary jurisdiction doctrine" described in *Total Telecommunications Services, Inc., v. AT&T*, 919 F.Supp. 472 (D.C. D.C. 1996).[17] BellSouth argues that because the Commission "has primary jurisdiction over claims that

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[17] *See* Petition at 10.

telecommunications tariffs or practices are not just or reasonable" that only the FCC may determine whether prices are just and reasonable in compliance with Sections 201(b) and 202(a). BellSouth misapprehends the doctrine of primary jurisdiction. The primary jurisdiction doctrine is a doctrine applied by *courts* to refer questions over which they have jurisdiction to administrative agencies that have primary administrative jurisdiction over the subject matter.[18] As a *judicial* doctrine for referral of cases from courts to administrative agencies, it is nonsensical to suggest that the doctrine of primary jurisdiction makes the Commission the exclusive arbiter of the just and reasonable standard.

In addition, BellSouth's argument that rate regulation under Section 201 and 202 is exclusively within the purview of the FCC is without merit. The cases on which BellSouth relies for this proposition precede the 1996 Act.[19] It is clear, therefore, that a federal statutory pricing standard does not operate to divest state commissions of their authority under Section 252. State commissions may regulate the price term of interconnection agreements according to the applicable federal standard, whether it be just and reasonable, or TELRIC.

III. THE ACT EXPRESSLY LIMITS THE COMMISSION'S AUTHORITY TO PREEMPT THE STATES

Beyond the substantive shortcomings of the "emergency" Petition, BellSouth's petition is also fundamentally procedurally flawed and must be rejected. Specifically, BellSouth seeks general preemption of state commission authority improperly through a declaratory ruling,[20] BellSouth rather than identify and seek preemption of specific statutory provisions or

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18 *See, e.g.,* Am.Jur.2d Administrative Law, § 480; *In Re: Long Distance Telecommunications Litigation*, 831 F.2d 627, 630 (6th Cir. 1987) *U.S. v. Radio Corporation of America*, 358 U.S. 334 (1959); *In Re: Starnet*, 355 F.3d 634 (7th Cir. 2004).

19 *See* Petition at 10 *citing e.g., In Re: Long Distance Telecommunications Litigation.* The Supreme Court in *AT&T v. Iowa Utilities Board* expressly upheld the combined state-federal role on pricing embodied in Sections 252(c)(2) and 252(d).

20 *See* Petition.

state commission rules, as expressly required by Section 253 of the Act,[21] makes a generic request for preemption through a declaratory ruling.

A. The 1996 Act Limits the Commissions Authority to Preempt State Commissions.

The foundation of the preemption doctrine is "the Supremacy Clause, U.S. Const., Art. VI, cl. 2, [which] invalidates state laws that 'interfere with, or are contrary to' federal law."[22] Preemption may be express or implied. Express preemption occurs to the extent that a federal statute expressly directs that state law be ousted completely or to some lesser degree from a field. Implied preemption occurs either when the *scope* of a statute indicates that Congress intended federal law to occupy the field exclusively (field preemption), or when state law is in actual conflict with federal law (implied conflict preemption).[23]

Of course, just as "preemption occurs when Congress, in enacting a federal statute, expresses a clear intent to preempt state law,"[24] Congress similarly can circumscribe the extent to which preemption is permissible under a federal statute. Congress did just that with the creation of Section 253(d) of the Act. As this Commission itself has noted:

> Although Congress "legislated comprehensively," which otherwise would support the conclusion that it was "occupying the entire field of regulation and leaving no room for the States to supplement federal law," Congress has made clear that the States

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21 47 U.S.C. § 253.

22 *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 US 707, 712 (1985).

23 *Freightliner Corp. v. Myrick,* 514 US 280, 287 (1995). *See also Jones v. Rath Packing Co.,* 430 U.S. 519, 540 (1977) (where compliance with state law does not trigger "federal enforcement," the state law is not inconsistent with federal law).

24 *Louisiana Public Service Comm'n v. FCC,* 476 U.S. 355, 376 (1986).

> are not ousted from playing a role in the development of competitive communications markets.[25]

Congress went well out of its way to preserve state authority and to tailor narrowly this Commission's preemption authority under Title II of the Act by including Section 253 in the 1996 amendments. Furthermore Commission preemption of mixed jurisdiction services is only permitted where state regulation so conflicts with federal requirements that the state *negates* the exercise of federal powers.[26]

Indeed, as Justice Breyer has stated, with the 1996 addition of Section 253, Congress "explicitly grant[ed] the FCC a particular preemption tool."[27] The Commission similarly has stated, "[t]he 1996 Act created [s]ection 253 of the Communications Act, which expressly empowers the Commission to preempt state and local laws under *certain specified conditions.*"[28] Further elaborating on the importance of Section 253, former Commissioner Furchtgott-Roth has stated:

> The 1996 Act contemplates that state commissions will play an important part in bringing competition to the local exchange markets, and it gives states freedom to fashion regulatory approaches that supplement the Act's federal requirements. This Commission may interfere with a state commission's requirements *only* pursuant to Section 253(d).[29]

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25 *The Public Utility Commission of Texas, et al. Petitions for Declaratory Ruling and/or Preemption of Certain Provisions of the Texas Public Utility Regulatory Act of 1995,* Memorandum Opinion and Order, 13 FCC Rcd 3460,152 (1997).

26 *See NARUC v. FCC,* 880 F.2d 22 (D.C. Cir. 1989); *California v. FCC,* 905 F.2d 1217 (9th Cir. 1990) (referencing *Louisiana Public Service Comm'n v. FCC,* 476 U.S. 355 (1986) (emphasis added).

27 *AT&T v. Iowa Util's. Bd.,* 525 U.S. 366, 416 (1999) (Breyer, J., concurring in part and dissenting in part).

28 *Section 257 Report to Congress (Identifying and Eliminating Market Entry Barriers for Entrepreneurs and Other Small Businesses,* Report, 15 FCC Rcd 15376, ¶ 46 (2000) (emphasis added).

29 *Statement of Commissioner Harold Furchtgott-Roth, Concurring in Part and Dissenting in Part, Western Wireless Corporation (Petition for Preemption of Statutes and Rules and Regarding the Kansas State Universal Service Fund Pursuant to Section 253 of the Communications Act of 1934,* Memorandum Opinion and Order, 15 FCC Rcd 16227, 16235 (2000) (citation omitted, emphasis added).

Thus, Congress did not provide the Commission unrestrained authority to preempt state regulation by "occupying the field" or through any form of "implied" preemption.[30]

B. BellSouth's Petition Fails to Acknowledge Congress' Express Limitation of Preemption Under Section 253(d).

BellSouth's Petition fails even to acknowledge the existence of Section 253(d) and asks the FCC to act as the sole arbiter of pricing for Section 217 elements. As the FCC has explained, Congress did not intend federal telecommunications requirements "to disrupt the pro-competitive actions some states already have taken."[31] Indeed, "[t]he Act exemplifies a cooperative federalism system, in which State Commissions can exercise their expertise about the needs of the local market and local consumers, but are guided by the provisions of the Act and by the concomitant FCC regulations.[32]

Elaborating on the balancing of interests resulting from the cooperative federalism set forth in the Act, the Supreme Court has stated:

> Congress has broadly extended its law into the field of intrastate communications, but in a few specified areas . . . has left the policy implications of that extension to be determined by the State commissions, which - within a broad range of lawful policymaking left open to administrative agencies - are beyond federal control.

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30 The Act contains other specific preemption provisions. For example, under Section 276(c), to the extent that any State requirements regarding the provision of payphone service are inconsistent with the FCC's regulations, "the Commission's regulations on such matters shall preempt such State requirements." The Act, however, does not give the Commission general preemption authority. Rather, the Commission's preemption powers are carefully circumscribed by the Act.

31 *In re Implementation of the Local Competition Provisions in the Telecommunications Act of* 1996, First Report and Order, 11 FCC Rcd 15499, ¶ 62 (1996) (subsequent history omitted) ("Local Competition Order").

32 *Puerto Rico Tel. Co. v. Telecomm's Regulatory Bd. of P.R.*, 189 F.3d 1, 14 (1^{5}" Cir. 1999). *See also, In re Verizon New England,* 2002 WL 253771 at 3 ("These various statutes preserving state authority are tied to specific aspects of the Act's requirements. Together, however, these statutes indicate that despite the detailed requirements the Act imposed on telecommunications operations, the regulatory scheme remains a partnership between federal and state authorities, in which states are granted broad power to regulate telecommunications as long as the states do not act inconsistently with federal law." *See also, Michigan Bell Telephone Company v. MCImetro Access Transmission Services, Inc.*, 323 F.3d 348, 352 (6th Cir. 2003) (noting that the additions of the local competition provisions to the Act in 1996 "has been called one of the most ambitious regulatory programs operating under 'cooperative federalism.'").

> Such a scheme is decidedly novel, and the attendant legal questions, such as whether federal courts must defer to State agency interpretations of federal law, are novel as well.[33]

Far from supporting a position that this Commission may preempt state commissions at will by declaratory ruling, the Supreme Court's opinion *Iowa Util's. Bd.* confirms that the Act preserves state commission authority to promulgate regulations both under the Act and under state law.[34] In sum, the plain terms of the Act foreclose the very type of broad, preemption advocated by BellSouth.

As explained in more detail below, several sections of the Act expressly preserve the states' ability to enforce and impose state law requirements on telecommunications carriers so long as those requirements are not inconsistent with the Act's requirements.[35] Congress thus "explicitly disclaimed any intent categorically to pre-empt State law."[36] On the contrary, "[t]he narrow scope of pre-emption available under [the federal Act] reflects the importance Congress attached to State . . . laws in achieving [the Act's] goal. . . ."[37] BellSouth conveniently ignores the Act, and Congress' intention to maximize the ability of the states to implement the pro-competitive goals of the Act.

C. Section 253, Not A Generic Request For Declaratory Ruling, Is The Appropriate Vehicle For The Relief Requested By BellSouth.

Congress amended Title II by adding Section 253 as a path to preemption to enable this Commission to ensure that no state or local authority could erect legal barriers to

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33 *AT&T v. Iowa Util's. Bd.*, 525 U.S. 385, n. 10 (emphasis added).

34 *Id.*

35 1996 Act § 601(c); *see also 47* U.S.C. §§ 261(b), (c), 251(d)(3), 252(e)(3); *Bell Atlantic Maryland v. MCI WorldCom, Inc.*, 240 F. 3d. 279 (4th Cir. 2001).

36 *California Fed Sav. & Loan Ass 'n v. Guerra,* 479 U.S. 272, 281, 288 (1987).

37 *Id.* at 282-83.

entry to telecommunications markets that would frustrate the 1996 Act's explicit goal of opening local markets to competition.

Section 253 allows for preemption of state regulations that amount to "barriers to entry" -- *i.e.,* any state regulation that "may *prohibit* or have the effect of prohibiting the ability of any entity to provide *any* interstate or intrastate telecommunications services."[38] Consistent with the overriding pro-competitive goal of the Act, Congress thus provided through Section 253 for the elimination of all state actions that impede competitive entry, while in contrast preserving any state actions that would seek to promote such entry and are otherwise consistent with the requirements of the Act.[39] BellSouth makes no claim under this provision, because the existing state commission decision at issue are fully consistent with the pro-competitive mandates of the Act.

In any event, and as described below, BellSouth's request for relief is inappropriate. Foremost, as previewed above, blanket preemption of possible state determinations through declaratory ruling is inappropriate under the Act, which sets forth the process this Commission must follow in order to preempt a state commission rule or state statutory provision. Indeed, the Act codifies a form of "cooperative federalism" that balances the authority of this Commission with that of the state commissions.[40] The TRA has acted well within its authority under the Act, and therefore, the Commission should reject BellSouth's Petition.

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38 *Id.* § 253(a), (d) (emphasis added). "Section 253(b) exempts from pre-emption under § 253(a) state regulatory laws that are imposed "on a competitively neutral basis" and that are designed to, *inter alia,* "ensure the continued quality of telecommunications services" or "safeguard the rights of consumers." 47 U.S.C. § 253(b). By requiring SWBT to enable CLECs to provide consumers and businesses with additional phone lines or new lines, this Commission assuredly would be satisfying the policy goals of § 253.

39 *See, e.g., 47 U.S.C. §§* 251(d)(3), 252(e)(3), and 261(c).

40 *Puerto Rico Tel. Co. v. Telecom's Regulatory Bd. of P.R., 189* F.3d 1, 14 (1[51] Cir. 1999).

D. The Relief Requested by BellSouth is Inconsistent with the Act.

BellSouth's Petition is fundamentally flawed because it fails to follow the process set forth in Section 253(d) of the Act. Instead of following the path codified by Congress, BellSouth requests that this Commission preempt the actions of the TRA and other state commissions. The Petition cites no statutory basis for the action it requests the Commission to undertake because none exists. BellSouth relies solely on Section 1.2 of the Commission's rules regarding declaratory rulings.[41] However, BellSouth's reliance on that section is misplaced. Section 253(d) codifies the Commission's path to preemption, and BellSouth knows that it cannot satisfy Section 253(d)'s standards.

IV. THE TRA'S DECISION FULLY COMPORTS WITH THE ACT AND THE COMMISSION'S ORDERS.

The action taken by the TRA, which is the subject of BellSouth's Petition, is in no way unlawful or inconsistent with the Act. Congress intended for active participation by the states in the ongoing effort to implement the Act in general, and Sections 251 and 271 more specifically. The Act contemplates a distinct and ongoing role for the states in furthering the development of competition in telecommunications markets.[42]

For this reason, Congress preserved state authority to impose additional regulations under several sections of the Act, including Sections 251(d)(3), 252(e), and 261(c).[43] Section 251(d)(3) specifically preserves the ability for state action under both the Act and state law. Sections 252(e)(3) and 261(c) preserve the states' general authority to establish and enforce regulations that are consistent with the pro-competitive provisions of the 1996 Act, including the unbundling provisions. Section 271(c)(1)(B) requires the state to determine whether a BOC has

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41 BellSouth Petition, 11-13

42 Local Competition Order, 11 FCC Red. at 15505, ¶ 2.

43 47 U.S.C. §§ 251(d)(3), 252(e), and 261(c).

failed to negotiate in good faith or, violated the terms of or failed to comply with a an approved interconnection agreement. Section 271(d)(2)(B) requires consultation with the state by the Commission to verify, *inter alia,* compliance with the fourteen point checklist in Section 271(c)(2)(B). In and of themselves, these provisions provide sufficient authority for states to establish regulations to promote competition within their jurisdictions.

A. The TRA's Decision Is Consistent With Section 251 Of The Act.

Section 251(d)(3) permits the states to establish regulations that do not conflict with the requirements of Section 251, and expressly precludes this Commission from impeding state regulations:

> *In prescribing and enforcing regulations to implement requirements of this section,* the Commission *shall not* preclude the enforcement of any regulation, order, or policy of a State commission that -
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> (A) establishes *access,* and interconnection obligations of local exchange carriers;
>
> (B) is consistent with the requirements of this section and
>
> (C) does not substantially prevent implementation of the requirements of this section and the purposes of this part.[44]

This section makes clear that the states' ability to establish regulations is expressly preserved by Congress, and is not a grant of delegated authority that the Commission can regulate away through a declaratory ruling by taking action outside of its narrowly-tailored preemption authority contained in Section 253(d).

Significantly, the states, under Section 251(d)(3), are not bound by the specific limits placed on the Commission when adopting regulations pursuant to Section 251(d)(2). Section 251(d)(3) by its express terms does not require all state access and interconnection

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[44] *Id.,* § 251(d)(3) (emphasis added).

regulations to be coextensive with the Commission's regulations promulgated under Section 251.[45] To be clear, Mpower Communications is not suggesting that states may impose *any* regulation. Rather, under subsection 251(d)(3)(B), any state prescribed obligations must be consistent with the requirements of Section 251. Subsection 251(d)(3)(C) prevents the states from adopting regulations that would "substantially prevent" the opening of the ILECs' networks to competitive carriers under the Commission's orders.[46] However, there simply can be no doubt that the ruling complained of by BellSouth does nothing to "substantially prevent implementation of the requirements" of Section 251.

Section 251(d)(3) reveals explicit Congressional intent to preserve state authority to adopt pro-competitive regulations, even where the Commission has not. In fact, the Eighth Circuit Court of Appeals held that Section 251(d)(3) "constrains the FCC's authority" to preempt State access and interconnection obligations.[47] With Section 251(d)(3), Congress intended to preserve the states' traditional authority to regulate local telephone markets and to shield state access and interconnection orders from FCC preemption, so long as the state rules are consistent with the requirements of Section 251 and do not substantially prevent the implementation of Section 251.

The simple fact is that BellSouth does not want to comply with a certain state commission ruling, and BellSouth further does not want to have regulation that varies by state. A lack of desire to comply with a regulation, however, does not form a basis for preemption

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45 *See Iowa Util's. Bd. v. FCC,* 120 F.3d 753, 807 ("subsection 251(d)(3) would prevent the FCC from preempting [a] state rule [that met the standards of Sections 251(d)(3)(B) and (C)] even though it differed from an FCC regulation.").

46 In addition, state regulations would also be constrained by Section 253(a), among other statutory and constitutional requirements.

47 *Iowa Util's. Bd. v. FCC,* 120 F.3d at 806 (8th Cir. 1997), not at issue in *AT&T v. Iowa Util's. Bd.,* 525 U.S. 366 *(1999).* The Eighth Circuit strongly suggested that a general FCC rule would be inappropriate to preempt any specific state regulations adopted under Section 251(d)(3). *Id.* at 806-07 & nn. 27-28.

under the Act. Indeed, the plain terms of Section 251(d)(3) do not preclude the establishment of state-specific obligations. To the contrary, that section expressly provides for state-specific obligations. As long as state access requirements are not in material conflict with the ILECs' obligations under the federal rules, such that compliance with both sets of requirements is impossible, the state obligations should be deemed to meet the Section 251(d)(3)(B) requirement of consistency.[48]

B. The TRA's Decision Is Supported by Section 271 Of The Act.

Section 271 "establishes that BOCs have "an independent and ongoing obligation"[49] "to provide access to loops, switching, transport and signaling regardless of any unbundling analysis under section 251."[50] Furthermore, under Section 271(c)(2)(B) BOC's are required to provide access "at just and reasonable rates".[51] Section 271(c)(2)(B)(i) specifically requires BOCs to provide interconnection in accordance with sections 251(c)(2) and 252(d)(1). These Sections clearly permit the State commissions to determine the just and reasonable rate for the interconnection of facilities.[52] No part of Section 271, 251 or 252 expressly or impliedly preempts the State commission's duty to determine these rates in accordance with the parameters established under Section 252(d)(1)(a).

* * *

Any Commission effort to preempt the authority of states to promulgate regulations addressing the pricing of Section 271 elements through a state commission arbitration proceeding under conflicts with the Act. The FCC may not through declaratory ruling

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48 *Id.*

49 Triennial Review Order, FCC 03-36, 407.

50 *Id.*

51 *Id.*

52 *See* 47 U.S.C. § 251(c)(2) and 252(d)(1).

ignore Section 253 or overrule Sections 251(d)(3), 252(e)(3), 261 or 271. Rather, in light of the preemption parameters established and the state authority preserved by Congress, this Commission is obligated to consider the preemption of state regulations, if at all, on a case-by-case basis in adjudicatory settings, pursuant to Section 253 and subject to the limitations in Sections 251(d)(3)(B) and (C). BellSouth's Petition fails to address, let alone satisfy, the statutory scheme set forth in the Act because it knows it cannot meet those high standards. Accordingly, the Commission should reject BellSouth's request for declaratory ruling.

V. CONCLUSION.

Consistent with the foregoing, the Commission should reject BellSouth's Petition.

Respectfully submitted,

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